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No. 05-785

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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THOMAS L. CAREY, WARDEN, *Petitioner*,

v.

MATHEW MUSLADIN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Mathew Musladin asserts (1) there is no "genuine" conflict in the circuit court decisions because they are in "almost complete agreement" with the decisions of this Court, (2) the Ninth Circuit's decision was consistent with 28 U.S.C. § 2254(d)(1), and (3) petitioner waived his contention that the Ninth Circuit erroneously found the alleged error structural. Musladin's attempt to rehabilitate the Ninth Circuit's decision fails and certiorari must be granted.

1. Musladin contends the conflict perceived by petitioner and seven judges of the Ninth Circuit is a "fiction." Brief in Opp. to Pet. for Writ of Cert. (Opp.) at 2; *see* Pet. for Writ of Cert. (Pet.) 8-13; Pet. App. 20a. He states, "No circuit, including the Ninth Circuit, allows the writ to be granted based on 'clearly established Federal law' as established by circuit court decisions." Opp. 4. He asserts the Ninth Circuit here did not look to it own decision, *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), to define "clearly established" federal law, but instead only to determine whether the California court's application of such law was reasonable. Opp. 3-4; *see* 28 U.S.C. § 2254(d)(1). The Ninth Circuit's own words belie Musladin's position:

> AEDPA limits the source of clearly-established federal law to Supreme Court cases. *See* 28 U.S.C. § 2254(d)(1).

> Nevertheless, we recognize that precedent from this court, or any other federal circuit court, has persuasive value in our effort to determine "whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and . . . *what law is 'clearly established.'*"

Pet. App. 5a (quoting *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) (ellipses in *Musladin*) (italics added)). The Ninth Circuit's analysis was consistent with its mistaken premise. Under the subheading "Clearly Established Federal Law," (Pet. App. 6a) and before addressing the reasonableness of the state court's decision, the Ninth Circuit stated, "This court's decision in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), has persuasive value in an assessment of the meaning of the federal law that was clearly-established by *Williams* and *Flynn* . . . ." Pet. App. 7a; *see also* Pet. App. 9a ("the state court's unreasonable application of federal law lies in its misapplication of the *Williams* test, as it was explained in *Norris*, to the facts of this case") ("The state court's decision to apply *Norris*, and ours to afford it persuasive weight when determining the federal law as established by *Williams*, are particularly significant in light of the striking factual similarities between *Norris* and the present case."), 13a ("The state court attempted to distinguish *Norris*, but *Norris* simply cannot reasonably be distinguished."), 14a ("We did not excuse the wearing of the buttons on that ground in *Norris*, and it was objectively unreasonable in light of *Norris* for the state court to do so here.").

The Ninth Circuit's reliance on circuit authority was not peripheral or supplementary. The question before the Ninth Circuit was whether clearly established Supreme Court authority compelled a decision other than that reached by the state court. The holdings of Supreme Court cases are the only clearly established federal law under AEDPA. *See Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Yet, the vast majority of the Ninth Circuit's decision is devoted to comparing the state court's decision to the Ninth Circuit's pre-AEDPA case, *Norris*

v. Risley, 918 F.2d 828. *See* Pet. App. 7a-15a. Musladin's suggestion that "the only reference to *Norris* was in a footnote," (Opp. 17) is flatly incorrect. Even a cursory reading of the Ninth Circuit's decision reveals that the court granted habeas relief under § 2254(d)(1) *not* because the state court's decision was contrary to or an unreasonable application of *Estelle v. Williams*, 425 U.S. 501 (1976) or *Holbrook v. Flynn*, 475 U.S. 560 (1986), but because the circuit court concluded that the state court decision was irreconcilable with *Norris*.

As Musladin acknowledges, *no* other circuit allows the writ to be granted based on the use of circuit authority to determine what federal law is "clearly established." Opp. 4. Indeed, if circuit authority is necessary to define what law is "clearly established," then perforce such law is not "clearly established" by this Court. The approach taken by the Ninth Circuit effectively allows a lower federal court to create new authority binding on the state courts by *extending* federal law clearly established by this Court. The Ninth Circuit's granting of habeas relief on the authority of its pre-AEDPA circuit law renders AEDPA standardless and conflicts with the authority of this Court, other circuit courts, and § 2254(d)(1).

2. Musladin similarly contends certiorari is not warranted because the Ninth Circuit properly considered circuit law in evaluating the reasonableness of the California Court of Appeal's application of established Supreme Court law. Petitioner has acknowledged that the existence of circuit and state cases reaching the same result as the state court "under similar circumstances" may confirm that a state court's decision was *reasonable*. Pet. 12 (citing *Price v. Vincent*, 538 U.S. 634, 643 & n.2 (2003)). That proposition is vastly different from the one invented by the Ninth Circuit in its decision below, specifically, that pre-AEDPA circuit law, to the exclusion of any and all other circuit and state court decisions, demonstrates that a state court's application of Supreme Court law was *unreasonable*. *See* Pet. App. 26a (Kleinfeld, J., dissenting). The AEDPA standard dictates that an unreasonable application

of Supreme Court law cannot be established upon a circuit court's decision that weighs no more in the equation than the state court decision to which it is compared. *See Price v. Vincent*, 538 U.S. at 643 & n.2 (federal *and* state court decisions relevant).

Musladin argues in essence that, under § 2254(d)(1), circuit courts have a free hand to interpret Supreme Court precedent, "particularly when deciding whether a given state-court decision was a reasonable application of a broadly stated Supreme Court rule." Opp. 6 (citing *Matteo v. Superintendent*, 171 F.3d 877, 890 (3d Cir. 1999)). This Court has established the opposite: "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Here, the established federal rule could hardly be more broad. *Estelle v. Williams*, 425 U.S. 501, and *Holbrook v. Flynn*, 475 U.S. 560, set forth a due process test in general terms, and neither case involved facts similar to those presented by the instant case. Both circumstances warrant wide deference to the state court's analysis. *See Alvarado*, 541 U.S. at 664.

Musladin's plea for deference to *circuit court* review of state court judgments reflects a misapprehension of AEDPA shared by the Ninth Circuit below. AEDPA mandates wide deference to the state court's decision where, as here, a general rule is involved. *See* 28 U.S.C. § 2254(d)(1); *Yarborough v. Alvarado*, 541 U.S. at 664. The Ninth Circuit, however, applied this Court's due process jurisprudence as though that gave *federal courts conducting habeas corpus review* wide leeway to apply their own specific strictures to the States. The Ninth Circuit used AEDPA as if it were a sword directed at state courts, when AEDPA is a shield intended precisely to foreclose such federal review of state judgments.

3. Musladin does not dispute that the alleged error here is subject to review for harmlessness under *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). *See* Opp. 24-28. He nevertheless asserts petitioner waived any dispute with the Ninth Circuit's

holding that the alleged error requires granting of the writ. Musladin conflates the issue of the appropriate standard of harmlessness with the issue whether the standard has been met. Petitioner does not request this Court to conduct harmless error review. Rather, petitioner contends the Ninth Circuit incorrectly found the alleged error was structural, when under this Court's authority, it was subject to review for harmlessness. *See Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 2015 (2005). The appropriate standard of harmlessness was never in dispute until the Ninth Circuit rendered its decision. A party cannot waive its opposition to an erroneous decision it cannot foresee.

Musladin also asserts that "there is no indication that the Ninth Circuit treated this error as structural." Opp. 24. The indication is this: The Ninth Circuit held that an "impermissible factor coming into play . . . . itself establishes 'inherent prejudice' and requires reversal." Pet. App. 10a; *see also id.* 11a n.1 ("As we held in *Norris*, reversal is required if a defendant can prove *either* actual *or* inherent prejudice."), 12a ("a practice that brands a defendant as guilty would surely be sufficient to demonstrate 'inherent prejudice' and require reversal"). The Ninth Circuit did not so hold because it decided petitioner waived harmless error review, because it had "serious doubts"about harmlessness, or because it found harmlessness could not be established on the facts of this case. *See* Opp. 27-28. Rather, the Ninth Circuit held that per se reversal was "required" by *Estelle v. Williams*, 425 U.S. 501 and *Holbrook v. Flynn*, 475 U.S. 560. Pet. App. 10a. The court below could not have stated its position, and misunderstood this Court's precedent, more clearly.

Musladin asserts that the Ninth Circuit's opinion "encompasses the *Brecht* harmless-error standard." Opp. 27. He asks rhetorically, "How could a courtroom arrangement that was 'inherently prejudicial' to the defendant's right to a fair trial and 'conveyed the message that the defendant was guilty' *not* have a substantial and injurious effect or influence on the jury's

verdict?" Opp. 28. The answer is simple: There is no evidence in the record that jurors saw the buttons or recognized what they depicted, let alone were influenced by them. A "courtroom practice" might be inherently prejudicial, yet never perceived by jurors.

The Ninth Circuit's decision is not an instance of garden variety error, but a dramatic misinterpretation of AEDPA. Its logic places at potential risk many if not all state court criminal judgments on federal questions which do not rest upon highly specific Supreme Court law applicable to narrowly contoured fact patterns. The Ninth Circuit announced its own circuit law, to the exclusion of any other state or federal decision, demonstrated the "clearly established" federal law under *this* Court's precedents. The court similarly found that its own circuit decision dictated that the state court's application of federal law was unreasonable simply because the state court and circuit court did not arrive at the same conclusion. The decision below is inconsistent with AEDPA and threatens systemic problems beyond the confines of the instant case.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 16, 2006

Respectfully submitted,

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